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In the Matter of	:	Date Issued: Nov. 21, 2000	
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DOUGLAS BAILES	:	Case No. 1999-LHC-2692	
Claimant	:	OWCP No. 14-124381	
	:		
	:		
v.	:		
	:		
FRED DEVINE DIVING	:		
Employer	:		
	:		
and	:		
	:		
MAJESTIC INSURANCE	:		
Carrier	:		
.....		:	

Before: Stuart A. Levin
Administrative Law Judge

DECISION and ORDER

This matter arises pursuant to a claim for benefits filed under the Longshoremen and Harbor Workers' Compensation Act by Douglas Bailes of Vancouver, Washington. Bailes, a senior commercial diver for Fred Devine Diving and Salvage Company, was injured at work on May 10, 1996, during a salvage operation in Snohomish River. While attempting to refloat the partially sunken 125' fishing vessel, "Deep Sea," Bailes was moving down grease covered stairs to install a pump in the engine room when he slipped and fell. Tr. 51-52. Hitting the last rung of the steps, just above the waterline, he grabbed the handrail to stop his fall and felt a sharp pain across his left shoulder and upper back. Id. The incident herniated the disc at C5/C6, and injured the left rotator cuff.

As a consequence of his injuries, the Parties agree that Bailes can no longer work as commercial diver. Following surgery and a period of temporary total disability, for which he was compensated,¹ Bailes found alternative employment and is currently working. The issues in this proceeding, then, are average weekly wage at the time of injury and Claimant's post-injury wage earning capacity.

The Injury

The record shows that Bailes continued to work after the injury, Tr. 52, and did not seek medical treatment until October 28, 1996, when he visited Dr. Stephen Brenneke, an orthopedic surgeon. Tr. 52-54. Dr. Brenneke diagnosed a left rotator cuff tear and sprain and administered injection therapy, but Bailes' symptoms continued. CX 5-6. The employer then sent Bailes to Dr. Clyde Farris, an orthopedic surgeon who examined him on February 7, 1997, and arranged for an MRI which revealed a herniated disc at C5/C6. EX 9; CX 10-11. Dr. Farris eventually referred Bailes to Dr. Eric Hummel, a neurosurgeon, who examined Bailes on April 24, 1997. Dr. Hummel doubted the C5/C6 disc was responsible for Claimant's symptoms and referred him back to Dr. Farris who provided additional injection treatment. CX13. With Bailes still experiencing fairly acute pain episodes six months later, Dr. Farris referred him to Dr. Ray Miller, a neurosurgeon. Dr. Miller obtained a second MRI which again revealed the herniated disc. CX 15.

Bailes worked during this period, until, on February 6, 1998, following a day of diving, he decided it was time to "get this thing fixed." Tr. 55-56. Again seeking medical attention, he first visited Dr. Farris who prescribed pain medication and returned to Dr. Miller who, on April 27, 1998, performed an anterior disc removal and fusion at C5/C6. EX 22, 26-30; CX 22, 23, 24. Bailes recovered from this surgery and reached maximum medical improvement on October 7, 1998. His diving days were over, however. Dr. Miller restricted him from repetitive lifting over 50 lbs. and precluded him from further diving. Tr. 12, 16, 22; CX 28, 29.

¹ Claimant received benefits for 12 hours of temporary total disability in 1996, and 5 1/2 days in 1997. Ex. 36; Tr. 191-92.

Average Weekly Wage

At hearing, Claimant asserted that his average weekly wage is \$977.57. Tr. 19. In his post-hearing brief he contends his pre-injury average weekly wage is \$1079.16. Cl. Br. at 14. Employer argues that his average weekly wage is \$860.60. Empl. Br. at 10.

On October 8, 1998, Bailes was hired by Technical Marine Services(TMS) as a technician installing, building, repairing, and maintaining engine control devises on ships. The work has been sporadic, involving, at times, 30 hours a week overtime some weeks, no overtime some weeks, and lay-offs on other occasions. Tr. 87-89. Although Claimant never knows how long a lay-off will last, Tr.89-91, 102-3, he has bid for temporary welding jobs in his shop at home. Claimant contends that his residual wage earning capacity is \$643.76 or \$674.17 per week. Cl. Br. at 13. Employer argues that his residual wage earning capacity and his average weekly wage are the same, \$860.60. Empl. Br. at 14.

Work History Pre-Injury

The record shows that Bailes, age 42, graduated from high school and earned an associates degree in marine diving technology from Santa Barbara College. Tr. 38-40. Following graduation, he moved to Louisiana and secured employment as an apprentice diver. He advanced to the level of a grade 1 diver, and, as his experience increased, his wages rose. While working for Global Divers and Salvage, a Louisiana firm, Bailes dived to depths of 600 feet, Tr. 40-41, and earned, approximately \$71, 800 including gear rental, in 1990. Tr. 63. In 1991, he earned approximately \$58,500. Tr. 63, 111.

In 1992, Bailes accepted a position on Kwajalein, Atoll in the South Pacific working as diver for a government defense contractor recovering warheads fired long distances into the lagoon. He accepted the position to spend more time with his wife and young children who moved to the island with him. Bailes testified credibly that he was paid about \$33,000 per year but his housing and utilities were provided by the contractor, his earnings were not taxed, and he and his family enjoyed the island lifestyle. Tr. 41.

After a year and half on Kwajalein, however, budget cutters ended program funding on the defense initiative which employed Bailes, forcing him to seek his fortune elsewhere. He quickly secured employment with Nichols Marine, a small fledgling shipyard owned by his friend in Portland, Oregon. He worked for Nichols for part of 1993 and 1994 when Nichols foundered, leaving Bailes again unemployed. Tr. 43-44, 117-118. His earnings in 1993 totaled \$33,259.45 on Kwajalein, and \$7490 from Nichols. In 1994, he earned \$32, 564.

In January 1995, Bailes was hired as a diver by Fred Devine diving, the employer involved in this proceeding. The divers at Fred Devine performed a variety of duties and were paid different rates depending upon their assigned tasks. Bailes' diving duties included setting blocks under ships in dry dock, bottom surveys, underwater video, pouring concrete underwater, setting explosives, and electric arc burning. As assistant diver he was responsible for mooring the vessel, the diver's hose and equipment, and communication with the diver. Tr. 48. As tender, he had to lift whatever the job required from 50 pounds to hundreds of pounds depending upon the strength of running tides and currents which push against divers and equipment as they move about or try to surface. Tr. 49-50. When diving, which accounted for approximately 20% of there work, Fred Devine employees were paid \$40 per hour and \$5.00 in gear rental. They received less when working as assistants and tenders, and the remainder of their time performing shop work paid initially \$10.00 per hour and later \$12.50 per hour. Working as a diver for Fred Devine, including all tasks from actual diving to shop work, Bailes earned \$43,098 in 1995, and \$43,403 in 1996, and \$50,833.94 over the 52 week period prior to the May 10, 1996 injury. CX 3.

Work History Post-Injury²

As noted above, once his diving career ended, Claimant quickly found employment at Technical Marine Services (TMS). The record shows that Claimant's pay rate at TMS when hired was \$16 per hour and increased, by 1998, to \$18.00 per hour up to 8 hours, \$27.00 per hour for the ninth and tenth hour, and

²In 1997, Bailes earned, post-injury, \$54,928.91 as a diver. Tr.60, 109-110. For reasons discussed in detail *infra*, however, these earnings are not included in his average weekly wage.

\$36.00 per hour over ten hours Tr. 87. The record further shows that the work at TMS fluctuates as the company bids for jobs installing and repairing automated ship controls. At times, overtime opportunities abound, but lay-offs occur, and when they do, employees may be recalled on very short notice. Tr. 90-93, 102. To generate some income during these lay-offs, Bailes purchased a welding machine and performed odd jobs in his garage while waiting for the TMS recall. Tr. 93. In 1999, he worked in 30 weeks for TMS, received 18 weeks of unemployment, and earned approximately \$2600 for about three weeks working at odd jobs during the lay-offs. Tr. 99-1000. From October 8, 1998 through December 31, 1998, his earnings totaled \$14,480.50, averaging \$1206.71 per week. From January 1, 1999 through December 31, 1999, \$29,474.10 at TMS. Ex 38; CX 30.

Bailes acknowledged that he has no difficulty performing the work at TMS, and would work full time, year round if the work were available and did not require constant travel. Tr. 101. When laid off, he never knows when he may be called back, Tr. 90, but he calls in once a week. Tr. 92. He does not seek work with other employers because TMS is his principal employer, and he is concerned he could lose his medical and dental insurance coverage if he signed on with another employer.

Work Opportunities at TMS and Elsewhere

Greg Steward supervises accounting and computer functions at TMS. Ex 38. He has worked for TMS for seven years, and has seen its workload generally grow with occasional slowdowns. EX. 38. He testified that 1999 typifies one such slowdown and is not generally representative of the work opportunities available to employees like Bailes. He expects the work to pick up this year and described 1999 as a slow year, EX 34, whereas the period 1996 through 1998 provides, in his opinion, a more accurate reflection of work availability at TMS. The earnings during this period of two workers employed in the type of job Bailes occupies were offered as illustrative:

Employee 1 Year	Hours Worked (All Categories)	Earnings
1996	1907.75	\$34,580
1997	2213	\$40,914.94
1998	2676.50	\$60,537.84

1999	1529	\$35,832.82
Employee 2		
1996	1878.50	\$34,158
1997	2281.50	\$44,117.38
1998	2570	\$57,733.75
1999	1390	\$32,616.50

Roy Katzen is a Vocational Counselor who reviewed Bailes' medical records, employment records, and spoke with the employer's personnel. EX 33, pg 95-96; Tr. 129. He calculated what he thought Bailes' wage level would have been had he worked for TMS in 1996 through 1999. Katzen reviewed the earnings of the two employees who worked for TMS during the period 1996-99, assumed TMS would have paid Bailes a higher rate of pay than either, Tr. 169, 181, and, in addition, he opined that Bailes could earn \$15 per hour working temporary jobs during lay-offs. Tr. 182-83. For 1996, he assumed a TMS pay rate of \$16.50 per hour and concluded Bailes would have earned \$35,461 from TMS and an additional \$8400 from other sources working as a welder at \$15 per hour, totaling \$43,861.39 or \$843 per week. Tr. 130-31. Based on the information available to him and the assumptions he applied, Katzen afforded Bailes a residual wage earning capacity ranging from a low of \$43,274 to \$52,849.68. Tr. 135-39, 141-2, 144-45.

In assessing Bailes' opportunities for work as a temporary welder during lay-offs at TMS, Katzen testified that he talked with potential employers of temporary welders who "kind of ball parked it" for 1996, Tr. 134, and testified that he found employers who not only would accommodate Bailes' skills, physical restrictions, short term employment needs, but were willing to let him leave the job on short notice. Tr. 134. He also checked the want ads placed by temporary employment agencies and determined that they were seeking welders at pay rates ranging from \$10-\$15 per hour; \$ 9.50-\$10.75; and \$8-\$12. The various pay ranges were based on skill levels. Tr. 183. Katzen observed that cutting and burning represents the lowest skill level, Tr. 134; 183, 184, 189-190. While Katzen apparently understood that Bailes was not a certified welder, Empl Br. at fn. 8; Tr. 165, he evaluated Bailes' skill level as "high-end MIG." Tr. 185. He thus assumed Bailes would earn temporary wages at the highest level of the ranges he found in the ads, \$15 per hour. Tr. 139-40. He acknowledged, however, that TIG welding was a higher skill level, Tr. 85, and Katzen could not specifically recall the range of pay in ads for MIG welders. Tr. 186.

The record shows that TMS is confident Bailes can satisfy its welding

requirements, but contrary to Katzen's assumption, Tr. 165, he does not MIG weld at all. Tr. 196-97. He is a stick or arc welder, Tr. 117, whose experience essentially involved tacking metal plate for the MIG welders who run the seams, Tr. 198-199, and according to Oregon Employment Department data, the mean wage in 1999 for welders and cutters in Portland was \$11.45 per hour. Tr. 172.

Scott T. Stipe is a vocational rehabilitation specialist called as a rebuttal witness by Claimant. He reviewed Claimant's age, education, experience, and physical limitations, and conducted a labor market survey. Tr. 205. In his opinion, the temporary welder jobs require heavy labor and Bailes' physical restrictions are too severe for "heavy range" jobs which he described as lifting 100lbs. with repetitive lifting to 50lbs. Tr. 213, 221-22. In addition, his firm contacted the same employers Katzen contacted, and determined that the employers wanted MIG or TIG, not stick, welders. Tr. 212, 228-29. As a diver, Bailes only tack welded as an ancillary duty. Tr. 213. In Stipe's opinion, he does not possess the typical welder's skills sought by employers of either permanent or temporary workers. Tr. 212. Moreover, his survey revealed that the Portland welding market did not offer much day labor type work. Tr. 214. He reported that the employers surveyed also advised that the temporary welding assignments "tend to last." As such, Stipe reasoned that Bailes' need to leave on short notice would be detrimental to his employability as temporary welder. He concluded that the temporary agencies Katzen surveyed would not want someone like Bailes who would leave a job on short notice. Tr. 213-214. The fact that Bailes is not a certified welder would, in Stipe's opinion, also adversely impact his ability to obtain temporary welding jobs. Tr. 217. Stipe thus disagreed with Katzen's conclusion that Bailes could have found employment for 14 weeks at \$15.00 per hour in 1996. Citing Oregon employment data for 1997, Stipe reported that welders' and cutters' average annual earnings totaled \$27,520, Tr. 217. He believes Bailes may, at best, have obtained an occasional day job, but not at \$15 per hour. At that level, employers, Stipe opined, want MIG and TIG welders.

DISCUSSION

I.

Average Weekly Wage

Section 10 of the Act provides three methods for determining the average weekly wage of an injured worker. Each is designed to provide an approximation of a worker's annual earnings under varying circumstances, and the method selected

should most closely reflect a realistic economic assessment of the earnings context in which the injury occurred. Johnson v. Newport News Shipbuilding & Dry Dock Co., 25 BRBS 340 (1992). In this instance, Claimant argues that Section 10(a) must be applied in calculating his average weekly wage, while the Employer contends that neither Section 10 (a) nor 10 (b) appropriately captures the reality of his wage earning history which can only fairly be determined under Section 10 (c). For the reasons which follow, I have determined that Section 10 (a) most accurately captures the reality of Claimant's wage earning situation during the year prior to his injury on May 10, 1996, in the relevant labor market.

Using Section 10 (a), Claimant earned \$50,833.94 during the period May 11, 1995, and May 10, 1996, the date of injury. The record indicates that Bailes worked a 40-hour or five days per week with some overtime. Tr 107. Consequently, his average daily wage is \$195.52, and his average weekly wage is \$977.58.

Historical Wage Data

The Employer objects to this calculation on the grounds that Claimant's work as a diver was irregular and intermittent, accounted for only 20% of his time, and results in an average weekly wage which exceeds Claimant's earnings in calendar year 1995 or 1996. Employer would, therefore, average his earnings from calendar years 1995 and 1996, which it believes "equalizes" the intermittent nature of diving and yields an average weekly wage of \$860.60. Employer attempts to solidify its contentions with wage data from 1992 through 1997, a six year period during which Claimant's average weekly wage totaled \$797.60.

Initially, it should be noted that the historical six-year wage data contain distortions which render its relevance in this proceeding of marginal usefulness. For example, the period 1992 through part of 1994 includes wage earned on Kwajalein for a defense contractor who, Claimant testified, provided Claimant and his family with housing, utilities, and tax free compensation. *See, Carle v. Georgetown Builders*, 14 BRBS 45, 51 (1980); *Denton v. Northrop Corp.*, 21 BRBS 37 (1988). Although Employer questioned whether these earnings were really tax exempt, it did not refute Claimant's contention that the job compensation on Kwajalein included advantages such as housing and utilities, and it did not attempt to refute Claimant's contention that the economic advantage they conferred allowed him to bank virtually his entire paycheck. Nor did it differentiate the

employment market for divers in Kwajalein with the market in Portland, Oregon. Yet, the record does indicate that various geographic markets offer a variety of opportunities for divers. Thus, Claimant worked for an employer in Louisiana before he accepted a position on Kwajalein and earned considerably more from that employer in 1990 than he earned with any subsequent employer. Employer's six-year historical portrayal includes Kwajalein and excludes Louisiana, and is not an especially useful category of wage data in this instance.

Divers' Duties

Nor was Claimant's work as a diver irregular or intermittent. The record shows that divers perform a variety of duties for which they are compensated at various rates of pay and their wages in any given week depend upon the amount of actual diving they perform. Nevertheless, duties which range from diving to assistant diving, to tender, to shop work are all customary duties assigned to divers employed by Fred Devine Diving and constitute their usual and customary employment. The record thus shows that Bailes was employed as a diver full time, 40 hours per week, during the one-year period prior to his injury, and there was nothing intermittent or seasonal about this employment.

I am mindful that Claimant's wages reflect, on average, that he spent approximately 20% of his time actually diving at a pay rate of \$40.00 per hour plus \$5.00 for gear rental, and that his rate descended to \$12.50 per hour for shop work. The record shows, however, that commercial divers rarely spend 100% of their time underwater. Yet, commercial diving is a full time occupation even though many of the duties it entails are performed above the water line. Bailes, in fact, was above the surface when he sustained his injuries. On this record, then, I conclude, based on unrefuted testimony, that Bailes' employment as a commercial diver by Fred Devine Diving was full time, non-seasonal, and regular; 40 hours "guaranteed." Matulic v. Jones Stevedoring Co., 154 F.3d 1052 (9th Cir. 1998); Eleazer v. General Dynamics Corp., 7 BRBS 75 (1977) Mulcare v. E.C. Ernst, Inc., 18 BRBS 158 (1986).

Economic Fluctuations

vs.

Work Assignments

The Employer argues further that a more accurate depiction of Bailes' wages

would average his earnings during a 104-week period encompassed by calendar years 1995 and 1996. The employer notes the Board's observation that averaging earnings in this way smooths out fluctuations due to economic conditions affecting the employer's business. *See, Anderson v. Todd Shipyards*, 13 BRBS 593 (1981). Yet, aside from the fact that a 104-week average lowers Claimant's average weekly wage, Employer has not otherwise demonstrated on this record that the economic conditions affecting the employer's business changed substantially during the fifty-two week period prior to the injury.

Rather than changed economic conditions, it is at least as likely on the evidence in this record that changes in Claimant's earnings indicate no more than merely fortuitous assignments to shop work rather than tender, assistant diver, or diver on occasion. Construing Anderson to apply under such circumstances moves it into the realm of micro-management decisions which vary the temporary assignment of personnel by an employer hour-to-hour rather than the economic circumstances which buffet or buoy its business. In the case of a commercial diver, Anderson, as interpreted by the Employer, would seem ubiquitously to preclude Section 10(a) application.

Diver Longevity

The Employer further suggests, in any event, that Bailes' days as a diver were numbered even if he had not been injured. The Employer called Roy Katzen, a vocational counselor, to testify regarding the professional lifespan of those who pursue a career as a commercial diver. Citing the 1993 LSU report, "Skilled Labor Work Life and Benefits: A Case Study of Divers in Oil and Gas Exploration," Katzen observed that a diver starting at age 22 has a worklife expectancy of 6.79 years; starting at age 38 (Bailes' age at the time of injury) the worklife expectancy is 3.6 years. According to the LSU study, the probability that a diver will still be working at age 45 is 1 to 2 percent, and only a small percentage leave due to injury. Tr. 150-151. The LSU study, however, focused on work involving oil and gas exploration in the Gulf of Mexico and did not discuss the reasons the divers quit or compare the nature of the work of those involved in the study with the type of work Bailes performed at Fred Devine Diving. Tr. 186-187, 188, 213-14, 231.

Bailes' experience in Kwajalein illustrates the problem of attempting to extrapolate the LSU data to divers in general. He testified credibly that he was the youngest diver employed on that project. Jimmy Hay, he recalled, was 45, Sid Kirk was 52, and Doc Berryman, the chief diver, was 62. Tr. 42. It would be tempting

to conclude that diving for warheads in Kwajalein's lagoon held a certain lure for middle aged divers not shared by those who labor elsewhere in dark waters below the mudline, but this record does not actually explain the professional longevity of divers on Kwajalein. Their experience merely suggests that the duration of a diver's career may depend, in part, upon many factors including the environment into which he descends. The LSU study acknowledges that some divers "stay forever," and refers vaguely to "lifestyle" considerations which impel others to leave. See, Tr. 178. This record thus fails to support the inference that Bailes' job at Fred Devine was analogous to oil and gas exploration dives in the Gulf of Mexico, and as a consequence, the LSU study does not support the Employer's notion that Bailes' worklife expectancy at the time of his injury was only 3.6 years. See, Tr. 231.

Untimely New Claim

I also reject Claimant's untimely assertion that his average weekly wage should be increased to reflect February 6, 1998 as the date of injury when a worsening of his symptoms ended his diving career. Claimant now argues that his condition on February 6, 1998, constitutes a new injury and his earnings for calendar year 1997, totaling \$54,929, increase his average weekly wage to \$1079.16. Employer objects that Claimant untimely and prejudicially raises this issue for the first time in his post-hearing brief, and has precluded it not only from preparing an adequate defense against Claimant's theory of new injury but an opportunity to raise an 8(f) defense as well.

There is evidence in the record which shows that following his May 10, 1996 injury, Bailes apparently experienced both a progressive increase in his symptoms and potentially specific incidents which caused his symptoms, such as, for example, when he ascended the ladder on October 26, 1996, (See, EX12, Pg. 1), and again on January 14, 1997 (See, EX 9 pg. 2), and following a particularly strenuous dive in the first week of February, 1998. (See, Ex pg. 1). As Claimant contends, an aggravation constitutes a new injury. Kooley v. Marine Industries N.W., 22 BRBS 142 (1989).

Yet, employer correctly emphasizes that until he filed his post-hearing brief, Claimant never raised the etiology of his symptoms as an issue in this proceeding. He predicated his claim upon the notion that his disability resulted from a natural progression of his May 10, 1996, fall, not a new injury on February 6, 1998. Merrill v. Todd Pacific Shipyard Corp., 25 BRBS 140 (1991). Employer thus believes

Claimant must file a new claim if he wishes to pursue a February 6, 1998, date of injury, and perhaps that is an option he may wish to consider. In this proceeding, however, I find and conclude that Claimant's belated assertion of a new injury is prejudicial not only because it raises entirely new average weekly wage issues involving data the Employer was not previously called upon to address, but new medical issues of etiology and Section 8(f) questions not fairly noticed by the original claim litigated in this proceeding.

Average Weekly Wage

For all of the foregoing reasons, I find that the date of injury in this proceeding is May 10, 1996, and the relevant period for assessing Claimant's average weekly wage is the fifty-two weeks prior to his injury. His average weekly wage is \$977.58.

II. Post-injury Wage Earning Capacity

The record shows that Bailes reached maximum medical improvement on October 8, 1998, with restrictions which preclude his return to commercial diving.³ A resourceful worker, however, he immediately found a job as a welder with TMS, and later built a little shop in his garage to earn some extra money doing odd jobs during times of lay off. The record further shows that TMS paid Bailes \$14,480.50 including bonus from October 8, 1998 to December 31, 1998, and \$29,474.10 during calendar year 1999.

Fred Devine considers these TMS earnings an understatement of Bailes' residual wage earning capacity. In its view, the TMS earnings not only fail to account for the \$15.00 per hour the Employer believes that Bailes can earn working as a temporary welder in his garage but distort his potential TMS earnings because TMS experienced a drop in its business in 1999. Claimant, in contrast, argues that the latter part of 1998 overstates his earning capacity at TMS even as his 1999 earnings reflected a slight downturn in TMS' business. In Claimant's opinion,

³ The parties do agree that the residuals of the injuries Bailes sustained on May 10, 1996 rendered him unable to return to commercial diving. He never asked Fred Devine for modified work, and although Mr. Leitz told Katzen that Fred Devine would have re-employed Bailes as an estimator/foreman at \$15.75 per hour, *See*, Tr. 152, 155, 176-77, it never offered it to him. Bailes found another job when Fred Devine asked him to start paying for his medical benefits. Tr. 83, 112.

then, the period October 8, 1998, through December 31, 1999, reduced by 11.1% to account for the May 10, 1996, date of injury,⁴ yields a correct residual wage earning capacity. He also denies that the data demonstrate that he has any significant earning potential as a temporary welder working sporadically during times of lay off.

Availability of Temporary or Part-Time Earnings

The parties called various witnesses who testified in support of their respective positions. Greg Steward of TMS credibly testified that 1999 was a relatively slow year at TMS. A more accurate assessment of TMS' business, he suggested, would take into account the period 1996 through 1999, and he presented the income of two welders as illustrative of the earnings opportunities the firm offered over that time. These data show that considerably more work was available to TMS' welders in 1996, 1997, and 1998, than in 1999.

The Employer also called Roy Katzen as a vocational expert. In his view, Bailes not only would have earned more than the two welders in Steward's survey, at a pay rate of \$16.50 per hour, but would have generated an additional \$8400 working as a temporary welder at \$15.00 per hour. I have carefully considered Katzen's testimony, and have accorded it diminished weight in this proceeding.

Initially, Katzen overestimated Bailes' skills as a welder. Bailes is not a "high end" MIG welder as Katzen assumed. His skills rank on the low end of the welder's trade as a tack or stick welder. Yet, Katzen's misunderstanding is imbedded in the data he presents. In analyzing the earnings of the two welders identified by Steward, Katzen assigns Bailes a higher wage than either. They earned \$16.00 per hour in 1996, while Katzen assumed Bailes would have commanded \$16.50 per hour. Moreover, while Bailes is described as a "prime welder" by Steward, TMS has never actually paid Bailes at a higher rate than the other TMS welders with whom Katzen compared him.

Katzen next attempted to establish that Bailes has an earnings potential of \$15.00 per hour working as a temporary welder. He conducted a labor market survey, sensed a strong demand for temporary welders in the Portland area, and

⁴ Employer did not contest the accuracy of this adjustment in its post-hearing submissions.

found that temporary welders could expect rates of pay ranging from \$8.00 to 15.00 per hour. Katzen knew that Bailes was not certified but estimated that, with what he thought were his high-end MIG skills, he could command the highest advertised pay rate. He acknowledged, however, that the advertised pay rates were skill-dependent, with TIG the highest skill level, MIG next, and arc or tack welding the lowest. In view of his acknowledgment of the correlation between skill levels and pay ranges in his survey, his misunderstanding of Bailes' skill level, and the fact that Katzen could not recall the specific rates offered for arc welders in his survey, it would be difficult to avoid concluding that Katzen's survey data do not support his opinion that Bailes, an uncertified arc welder, could earn the top rate of \$15.00 per hour as a temporary welder.

The record further shows that Bailes rarely knows how long a TMS lay off will last and is usually called back by TMS on short notice. Nevertheless, Katzen concluded that Portland was such a hot market for welders that demand would compel Employers to hire someone like Bailes on a temporary basis even if they knew he was likely to leave the job with very little advance notice. This analysis, however, was specifically refuted by Scott Stipe who Claimant called as a vocational expert.

Stipe testified that he contacted the same employers Katzen contacted and determined not only that they were primarily seeking MIG and TIG welders, but the jobs described as temporary tended to last for awhile. Since Bailes was not a certified MIG or TIG welder, Stipe reasoned that \$15.00 per hour was beyond the pay range Bailes might reasonably expect to earn as temporary welder even if he were fortunate enough to find an occasional day job. In addition, he noted that many of the temporary welding jobs tended to involve physical requirements which exceeded restrictions imposed by Dr. Miller. Given Bailes' physical limitations, skill level, and the fact that he would likely be required to leave a job on short notice, Stipe was considerably less sanguine about Bailes' overall employability as a temporary welder than Katzen, and the record supports his analysis. Bailes may be able to secure odd jobs on a temporary basis, but his potential future earnings from such endeavors on this record is highly speculative. Considering the record viewed in its entirety, I conclude that Katzen's estimation of Bailes' potential earnings as temporary welder is not well founded and must be rejected.

Post-Injury Employment

Relying in part upon Katzen's analysis, the Employer has argued throughout this proceeding that Bailes' residual wage earning capacity as an uncertified arc welder is the same as his pre-injury average weekly wage as a commercial diver. According to Fred Devine Diving, Bailes, therefore, suffered no loss of wage earning capacity as a result of the injury which ended his diving career.

When experts gather to massage a data set the results are often interesting and conflicting. In this instance, for the reasons discussed above, I find the analysis formulated by Stipe better reasoned and more sensitive to Bailes' actual skills and abilities than the evaluation rendered by Katzen. I find, moreover, other data in the record which tend to confirm Stipe's opinion that the injury adversely impacted Bailes' wage earning capacity in a significant way.

TMS Sales and Welders' Earnings

Employer questions whether Bailes' earnings at TMS fairly portray his residual wage earning capacity. With the adjustments noted below, I believe they do. While Employer accurately assesses 1999 as a relatively slow year at TMS, Claimant accurately notes that 1998 was a very good year for TMS. Whether or not the volume of work in last quarter of 1998, fairly balances the 18 weeks of lay off Bailes experienced in 1999, however, deserves consideration.

Because the Employer itself attempted to correlate the 1999 downturn in TMS' business with Bailes' earnings in that year, Claimant appropriately responded by including the last quarter of 1998 in which his earnings and TMS' sales were higher than usual. Whether this cures the distortion which concerns the Employer can only be determined from a historical perspective. Normal fluctuations in the business cycle generally even out over time. The question then is whether the inclusion of Bailes' 1998 fourth quarter earnings, which included a bonus, fairly balances what this record indicates was an unusually slow year in 1999 in which Bailes experienced 18 weeks of lay off.

The record shows that Bailes received total compensation in the last quarter of 1998 in excess of \$14,000, which if annualized would represent approximately \$56,000 in earnings, and that rate approximately equaled the earnings of Employees One and Two for 1998. In that year, TMS welders each worked in excess of 2600 and 2500 hours respectively. Based on Bailes' earnings, it appears the fourth

quarter of 1998 kept pace with the three previous quarters. In fact, the Employer provided data for TMS covering a period of four years, and 1998 was, by far, the busiest year of the four.

It is true that TMS sales in the last half of 1999 averaged only \$135,940 per month, however, when the focus shifts to the entire period of Bailes' TMS employment a different picture emerges. The record shows, from October 1, 1998, to December 31, 1999, TMS grossed \$3,713,137 or \$247,542 per month which compares favorably with the historical data. For the period July 1, 1995 to December 31, 1999, TMS' average sales were \$236,621 per month.

Employer argued in its Reply Brief that the best evidence of work opportunity for TMS employees is reflected in their work hours not TMS monthly sales averages. Yet, the testimony Employer cites in support of its contention does not substantiate its assertion. Specifically, the witness, Steward, testified that the monthly sales figures represent the money received in a month not the month in which the work was performed. As a result, Steward testified that "If you're wanting to look and see, you know, when were we really busy, when were we not, it probably would be more accurate to look at the hours worked." EX 38, pg. 40. The distortion which concerned Steward is significantly attenuated, however, when the relevant inquiry involves a comparison of monthly averages over a period of four and one half years with a period of one and one quarter years. Under such circumstances, beyond the margin between the third and fourth quarter of 1998, marking Bailes' arrival at TMS, it would not likely much matter whether work performed in October of 1998, for example, was paid for in April of 1999. And even at the margin, the Employer has failed to show that the amount of work performed before Bailes arrived at TMS in October, 1998, significantly distorted the TMS earnings figures after his arrival.

Thus, the record shows that the inclusion of the last quarter of 1998 in the statistical base renders the period of Bailes' employment with TMS fairly typical. TMS' average monthly business during Bailes' employment from October, 1998, to December, 1999, taking into account the early upturn and the subsequent downswing from July, 1999, to December, 1999, is slightly better than its performance during the overall period from July, 1995, to December, 1999. While 1999 data may unfairly tend to lower Bailes' residual wage earning capacity considering TMS' business that year, the inclusion of the last quarter of 1998 smooths out the distortion and results in a reasonably accurate depiction of work opportunities available to TMS welders.

Comparative Wage Earning Capacity

The record shows that Bailes, despite his injury, continued to work as a diver through 1997. The record further shows that as a commercial diver, he earned \$40.00 per hour plus \$5.00 per hour gear rental when diving, and spent approximately 20% of his time underwater. He spent approximately 20% of his time performing other tasks such as, for example, assistant diver or running a tender which paid \$22.50 per hour, and the remaining 40% as a shop worker at \$12.50. Although I have not included these post-injury 1997 earnings as a diver in Claimant's average weekly wage or the post-injury earnings calculations set forth hereinafter, they do provide a contextual format which illustrates the comparative earning power in 1997 of a Fred Devine diver and a TMS welder.

At TMS, the welder earned \$18.00 per hour up to eight hours, \$27.00 per hour for the ninth and tenth hour, and \$36.00 per hour after ten hours. In a hypothetical 40-hour week with no overtime, the welder at TMS earned \$18.00 per hour for 40 hours or \$720.00. In the same week, the diver earned 20% or 8 hours at \$45.00 per hour, 20% or 8 hours at approximately \$22.50 per hour, and 40% or 24 hours at \$12.50 per hour, totaling approximately \$840.00. In a purely economic sense, an injured diver who becomes a TMS welder loses wage earning capacity and must work more hours as a welder to make up the difference. Moreover, the record confirms what this hypothetical workweek suggests. The data show that Bailes did not work more than 2200 hours in 1997, Tr. 115,⁵ but earned \$54,928. Two welders at TMS in 1997 worked 2213 hours and 2281.5 hours respectively and earned \$40,914.94 and \$44,117.38 respectively. Thus, working approximately the same or even a few more hours in 1997, the TMS welders earned from about \$10,000 to \$14,000 or \$186.53 to \$257.69 per week on average less than Bailes earned as a diver.

I am, of course, mindful that the record does not show the distribution of Bailes' various assignments or overtime in 1997, but it is equally true that the data for the two workers at TMS do not reveal the distribution of their regular hours or overtime. As noted above, however, the 1997 comparison of total hours and pay for TMS welders with Bailes' hours and pay trends in a direction consistent with

⁵The number of hours Claimant actually worked in 1997 is not in the record. His testimony indicated that he did not work more than 2200. Tr.115. How many hours fewer than 2200 he may have worked can not be ascertained on this record.

the hypothetical standard 40-hour workweek set forth above. As the Board has observed, the proper measurement in determining loss of wage earning capacity is an economic measurement, Devillier v. National Steel and Shipbuilding Co., 10 BRBS 649 (1979), and this record shows that for approximately the same number of hours worked, Claimant has clearly lost wage earning capacity. Indeed, it is well settled that a worker who is able to earn wages after injury comparable to pre-injury earnings “only by expending more time and effort should be compensated.” Devillier, supra at 658; *See also*, Hughes v. Litton Systems, Inc., 6 BRBS 301, 304(1977). As the comparative data show, contrary to the Employer’s arguments, Claimant’s wage earning capacity was not unaffected by the injury.

Post-Injury Wage Earning Capacity Calculation

In view of the foregoing, including the flaws in Katzen’s analysis, I find and conclude that a disparity does exist between Bailes’ wage earning capacity as a diver and his residual post-injury wage earning capacity as an uncertified tack welder, and this loss is reasonably, if not perfectly, reflected in his actual TMS earnings adjusted as of the time of injury, as further adjusted by \$2600 in actual part time earnings he received during lay offs.⁶ With respect to the latter, Claimant contends that his expenses offset his income and actually produced a tax loss, but he failed to produce his tax returns documenting those losses when requested by the Employer, and accordingly, I have discounted the alleged losses in calculating his temporary job earnings.

For all of the foregoing reasons, I find and conclude that Bailes has a residual wage earning capacity totaling \$652.48 for his 63.43 weeks at TMS, based upon the \$14,480.50 he earned from October 8, 1998 to December 31, 1998; \$29,474.10 from January 1, 1999 to December 31, 1999; and \$2600 in part time earnings, totaling \$46, 554.60, as adjusted by 11.1% to account for the increase in the hourly rate for welders at TMS since the date of injury.

⁶The Employer, citing Tr. 94 and Tr. 100, asserts that Claimant earned \$4300 part time in 1999. The record shows that Claimant earned \$2600 in 1999. Tr 100. He testified that he bid \$1700 on the “Fox Tower” job, Tr.94, but indicated at the February 16, 2000 hearing that “I just got the Job,” and after expenses anticipates he is “going to make” \$700. Tr 93-94. The record places the “Fox Tower” income in year 2000 earnings not, as the Employer urges, in Claimant’s 1999 earnings.

Penalties

Claimant demands penalties under Section 14(e) for his permanent partial disability from October 8, 1998 to May 25, 1999. Tr. 254; Cl. Br. at 13. Employer did not respond to this issue at hearing nor address it in its post-hearing submissions. The record shows that on May 25, 1999, Employer noted its disagreement with a letter, dated March 26, 1999, it received from the District Director regarding the District Director's "assessment of compensation due Mr. Bailes..." CX 4. Employer does not allege that the District Director's letter, although dated March 26, 1999, was not actually received until much later. Nor does Employer dispute its alleged failure either to pay the additional compensation or to timely file a notice of controversion. Under such circumstances, I conclude that Section 14(e) penalties apply to "all additional compensation owed" from October 8, 1998, to May 25, 1999. Browder v. Dillingham Ship Repair, 24 BRBS 216 (1991). Accordingly:

ORDER

IT IS ORDERED that the Employer pay Claimant compensation for permanent partial disability commencing on October 8, 1998, based upon an average weekly wage of \$977.58 and a residual wage earning capacity of \$652.48 per week;

IT IS FURTHER ORDERED that the Employer pay Claimant penalty of ten percent applied to addition compensation due from October 8, 1998 to May 25, 1999, under Section 14(e).

STUART A. LEVIN
Administrative Law Judge